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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ROBERT W. SAUNDERS,
Defendant.

Case No. 14-CR-00243-LHK

**ORDER GRANTING THE
GOVERNMENT'S EX PARTE MOTION
TO AMEND THE INDICTMENT**

Re: Dkt. No. 99

On September 10, 2015, Defendant Robert Saunders (“Defendant”) was charged in a Superseding Indictment with, among other counts, one count of intentional damage to a protected computer in violation of “18 U.S.C. §§ 1030(a)(5)(A) & (c)(2)(B)(iii)” (“Count One”). ECF No. 41. Before the Court is an ex parte motion by the United States to correct the penalty provision citation of “(c)(2)(B)(iii)” to “(c)(4)(B)(i).” ECF No. 99. Although the motion was filed ex parte, Defendant opposed the motion on February 19, 2016.¹ ECF No. 100. Having considered the

¹ Defendant does not oppose the instant motion on procedural grounds. However, Criminal Local Rule 47-3 requires an ex parte motion to “contain a citation to the rule or order which permits use of an ex parte motion to obtain the relief sought.” Crim. L.R. 47-3. Here, the government fails to identify a “rule or order” permitting the government to file an ex parte motion. *See* ECF No. 99. Because Defendant filed an opposition to the instant motion, the Court will not strike the instant motion for failing to comply with the local rules. However, if the government had concerns about

1 submissions of the parties, the relevant law, and the record in this case, the Court GRANTS the
2 government's ex parte motion to amend the indictment.

3 Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment be a "plain, concise
4 and definite written statement of the essential facts constituting the offense charged." Fed. R.
5 Crim. P. 7(c)(1). Additionally, "[u]nless the defendant was misled and thereby prejudiced, neither
6 an error in a citation nor a citation's omission is a ground to dismiss the indictment or information
7 or to reverse a conviction." *Id.* 7(c)(2). Accordingly, the Ninth Circuit has held that a court may
8 correct a citation error in the indictment when the error "did not mislead [the defendant] as to the
9 charges against him" and the defendant was not "prejudiced by the incorrect citation." *United*
10 *States v. Lim*, 984 F.2d 331, 337 (9th Cir. 1993) (affirming the district court's grant of the
11 government's motion to amend a "clear typographical error" in the indictment); *see also United*
12 *States v. Neill*, 166 F.3d 943, 948 (9th Cir. 1999) (finding that a defendant was not prejudiced by
13 the amendment of the indictment when the defendant was able "to make a plea and prepare a
14 defense"). For the following reasons, the Court finds that the citation error in the instant case did
15 not mislead nor prejudice Defendant.

16 First, the penalty provision cited in the Superseding Indictment is inapplicable to
17 Defendant. Section (c)(2)(B)(iii) provides a maximum penalty of five years' imprisonment for
18 offenses "under subsection (a)(2)." *See* 18 U.S.C. § 1030(c)(2)(B)(iii). However, Defendant was
19 charged under a different section of Title 18, subsection (a)(5)(A). Although Defendant argues
20 that Defendant was "entitled to rely on the multiple citations in the Superseding Indictment to . . .
21 (c)(2)(B)(iii)," ECF No. 100 at 3, it is clear from the face of the Superseding Indictment that this
22 penalty provision can not apply to Defendant. By contrast, the corrected penalty provision,
23 Section (c)(4)(B)(i), provides a maximum penalty of ten years' imprisonment for offenses "under
24 subsection (a)(5)(A)." *See id.* § 1030(c)(4)(B)(i).

25 Second, the charging language in the Superseding Indictment tracks the language of
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timely resolution of its motion, the government should have filed a motion to shorten time.

1 Section (c)(4)(B)(i). The Superseding Indictment alleges that Defendant's conduct "caused loss to
2 1 or more persons during a 1-year period affecting protected computers aggregating at least \$5,000
3 in value." ECF No. 41 ¶ 9. This language triggers the application of Section (c)(4)(B)(i). *See* 18
4 U.S.C. § 1030(c)(4)(B)(i) (applying to "an offense under subsection (a)(5)(A) . . . if the offense
5 caused . . . a harm provided in subclauses (I) through (VI) of subparagraph (A)(i)[,]" which
6 includes "loss to 1 or more persons during any 1-year period . . . aggregating at least \$5,000 in
7 value").

8 By comparison, the penalty under Section (c)(2)(B)(iii) is imposed when "the value of the
9 information obtained exceeds \$5,000." *See id.* § 1030(c)(2)(B)(iii). The Superseding Indictment
10 does not allege that the value of the information obtained exceeds \$5,000.

11 Third, the penalty sheet filed in conjunction with the Superseding Indictment states that the
12 maximum sentence for Count One is "10 Years." *See* ECF No. 41. This is the maximum penalty
13 for Section (c)(4)(B)(i), not Section (c)(2)(B)(iii) (five years maximum imprisonment).

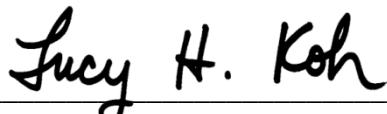
14 Consequently, Defendant has been on notice since the return of the Superseding Indictment
15 on September 10, 2015, that Section (c)(2)(B)(iii) does not, and can not, apply to Count One.
16 Additionally, Defendant has been on notice that the government does not intend to prove at trial
17 that "the value of the information obtained exceeds \$5,000," as required by Section (c)(2)(B)(iii).
18 Rather, the Superseding Indictment states that the government will attempt to prove that
19 Defendant's conduct "caused loss to 1 or more persons during a 1-year period affecting protected
20 computers aggregating at least \$5,000 in value," as required by Section (c)(4)(B)(i). Further,
21 Defendant has been on notice since September 10, 2015, that the government believes the
22 maximum penalty for Count One to be ten years' imprisonment. The Court notes that in the joint
23 proposed verdict form submitted by the parties on February 16, 2016, Defendant agreed to use the
24 correct penalty provision, Section (c)(4)(B)(i).² *See* ECF No. 91.

25 _____
26 ² Moreover, the government's proposed jury instructions, filed February 3, 2016, also reflect the
27 correct penalty provision, Section (c)(4)(B)(i). ECF No. 80 at 3. Additionally, in the
28 government's trial memorandum, filed February 3, 2016, the government points out the incorrect
citation of Section (c)(2)(B)(iii) in the Superseding Indictment, and states that the government will

1 In light of these circumstances, the Court concludes that Defendant was on notice of the
2 correct penalty provision and not prejudiced by the citation error. *See Neill*, 166 F.3d at 948. The
3 Court GRANTS the government's ex parte motion to amend the indictment and ORDERS that all
4 references to 18 U.S.C. § 1030(c)(2)(B)(iii) in the Superseding Indictment shall be stricken and
5 replaced with 18 U.S.C. § 1030(c)(4)(B)(i).

6 **IT IS SO ORDERED.**

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8 Dated: February 22, 2016

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11 LUCY H. KOH
12 United States District Judge

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use the correct penalty provision, Section (c)(4)(B)(i), at trial. ECF No. 79 at 2 n.1.